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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 372

LAW RESEARCH SERVICE, INC.
and ELLIAS C. HOPPENFELD,

Petitioners,

—against—

BLAIR & CO., GRANBERY MARACHE, INCORPORATED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI ON BEHALF OF RESPONDENT BLAIR & CO., GRANBERY MARACHE, INC.

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Dated: October 13, 1971

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Respondent Blair & Co., Granbery Marache Incorporated ("Blair") files this brief in opposition to the petition for a writ of certiorari filed by petitioners Law Research Service, Inc. ("Law Research") and Ellias C. Hoppenfeld ("Hoppenfeld") to review a judgment of the Court of Appeals for the Second Circuit rendered on June 14, 1971.

Question Presented

Whether review on petition for certiorari by this Court is merited in this case wherein three co-defendants have been held jointly and severally liable in a civil action under

[illegible] of the Securities and Exchange Act of 1934 and one of the three who was compelled to pay the entire judgment, obtaining contribution by motion from the other two, where a state statute permits a motion for contribution after judgment.

Statement of the Case

Elliot Hoppenfeld in the early 1960's conceived the idea of marketing computerized legal research. In 1963 Hoppenfeld founded Law Research Service, Inc. For this purpose and operated its predecessor (Appx. p. 6a).*

In 1965 it was decided to make a public offering of stock in Law Research. Bear was engaged as underwriter, and an offering circular was prepared. In the underwriting agreement entered into on March 15, 1965, Law Research agreed to indemnify Bear against all claims insofar as they arose out of an untrue statement or omission of material fact in the offering circular (Appx. p. 6a).

Sperry Rand Corp. ("Sperry Rand") had previously agreed to provide computer services to Law Research by a long-term contract. A dispute over payment arose between Sperry Rand and Law Research and Sperry Rand discontinued its services. Law Research then filed a complaint for breach of contract (Appx. p. 7a).

The offering circular spoke of a long-term contract for computer services with Sperry Rand but omitted mentioning the pending litigation against Sperry Rand. The dispute was [illegible] shortly thereafter (Appx. p. 7a).

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* References "Appx. p. ___" are to the "Supplemental Joint Appendix" filed on behalf of all the parties in the Court of Appeals.

In the meantime, the offering was completed, and the plaintiffs were among the purchasers. Thereafter, the price of the stock fell, and plaintiffs brought this action on June 3, 1965 against Law Research, Hoppenfeld, and Blair. Plaintiffs alleged that the said omission from the offering circular violated sections 12(1) and (2) and 17(a) of the Securities Act of 1933 (15 U.S.C. §§771(1) and (2) and 77q(a)) and sections 10(b) and 15(c) of the Securities Exchange Act of 1934 (15 U.S.C. §§78j(b), 78o(c)) and that therefore, defendants should be liable for the losses sustained by plaintiffs (Appx. p. 7a).

Blair filed a cross-claim against Law Research based on the indemnification clause in the underwriting agreement. Blair also filed a cross-claim against Hoppenfeld, since it had relied on the false representations of Hoppenfeld in preparing the offering circular (Appx. p. 7a).

A trial was held in April 1968 in the United States District Court for the Southern District of New York before Judge Mansfield and a jury. The jury found for the plaintiffs against all defendants and awarded compensatory and punitive damages. The jury also found for Blair, and against Law Research and Hoppenfeld on the cross-claims based on the indemnification agreement. The court, however, set aside the jury verdict on the cross-claims and entered judgment for compensatory damages against "all defendants (*i.e.*, Law Research, Hoppenfeld and Blair) jointly and severally" totaling $32,591.14 plus interest (Appx. p. 8a). The opinion of Judge Mansfield is reported in *Globus* v. *Law Research Service, Inc.*, 287 F. Supp. 188 (S.D.N.Y. 1968).

The judgment was appealed to the United States Court of Appeals for the Second Circuit, which reversed the puni-

tive damage award, affirmed the joint and several damage award, and sustained the dismissal of the cross-claims of Blair. *Globus* v. *Law Research Service, Inc.*, 418 F.2d 1276 (2d Cir. 1969). The Second Circuit recognized that as between the three defendants, Blair was the least culpabl 418 F.2d at 1289. Nevertheless, the Court held that such indemnity agreements were against the policy of the Securities Acts and stated, "[T]he proper purpose of the Act is to encourage diligence, investigation and compliance with the requirements of the statute by exposing issuers and underwriters to the substantial hazard of liability for compensatory damages." 418 F.2d at 1289 (Appx. p. 9a).

Thereafter, plaintiffs made a demand that the defendants satisfy the judgment. Petitioners Hoppenfeld and Law Research refused to make any payment toward the satisfaction of the judgment. Blair made payment to plaintiffs of $36,888.59, that being the full amount of the judgment plus interest and costs. A satisfaction of the judgment was filed with the District Court by plaintiffs (Appx. p. 9a).

Blair made due demand upon Law Research and Hoppenfeld that they each contribute their pro rata share of this judgment, but they refused (Appx. pp. 15a, 16a). The motion for contribution was then brought in the District Court and came before Judge Frankel, who granted the motion. *Globus* v. *Law Research Service, Inc.*, 318 F. Supp. 955 (S.D.N.Y. 1970) (Pet. Appx.* "B"), and entered judgment for contribution (Pet. Appx. "C"). The judgment of the District Court was then appealed by Law Research and Hoppenfeld to the United States Court of Appeals for the Second Circuit, which unanimously affirmed on the opinion below (Pet. Appx. "D").

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* References to "Pet. Appx. " are to Appendices "A", "B", "C", or "D" to the Petition for Certiorari herein.

Grounds Why the Cause Should Not Be Reviewed by This Court

The opinion of the United States District Court for the Southern District of New York in this case, unanimously affirmed by the Second Circuit herein, held that Blair, one of three co-defendants, held jointly and severally liable for damages in an action under Section 10(b) of the Securities Exchange Act of 1934 and which paid the entire joint and several judgment, may have contribution against the other co-defendants in the action.

This ruling is in accord with a prior federal court decision containing a ruling to the same effect. *deHaas* v. *Empire Petroleum Co.*, 286 F. Supp. 809 (D. Colo. 1968), *aff'd in part and mod. in part on other grounds* 435 F.2d 1223 (10th Cir. 1970). It is also in line with the fact that all sections of the Federal Securities Laws expressly providing for private civil actions also expressly provide for the right of contribution among jointly and severally liable defendants in such actions. The decisions in the present case and in *deHaas* merely extended the same principle to the judicially established right of civil action under Section 10(b) of the Securities Exchange Act of 1934, as a matter of consistency.

The decision below thus represents a clear ruling on a matter of federal law as to which there is no conflict among federal courts. It represents an application of an established principle of federal law, which does not merit review by this Court under the considerations governing review on certiorari set forth in this Court's Rule 19. This conclusion is supported by the following points:

I.

New York law does not prohibit a motion for contribution in an action under the Securities Exchange Act of 1934.

The petition for certiorari herein relies strongly on the contention that the decision below conflicts with New York law. Aside from the obvious point that New York law does not apply in an action under the Federal Securities Laws, the premise of the contention is unsound.

The motion for contribution below, made in this action where the joint and several judgment was rendered, was brought in accordance with Section 1401 of the New York Civil Practice Law and Rules which provides for contribution by motion among joint tort-feasors.

Petitioners contend that Section 1401 of the Civil Practice Law and Rules "does not apply to a judgment for fraud and deceit" (Pet. p. 9).

It is submitted, however, that an action under Section 10(b) of the 1934 Act is not one for "fraud and deceit" within the meaning of the New York decision cited. The alleged New York rule prohibiting contribution for fraud and deceit is based on a common law concept of "fraud". However, reference to "fraudulent" conduct is wholly inappropriate in the context of an action under the Federal Securities Laws, because a showing of intentional fraud of moral turpitude is not a requirement under these laws. See *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833, 855 (2d Cir. 1969) wherein the Second Circuit stated that Section 10(b) implements "a standard of conduct that encompasses negligence as well as active fraud".

Thus, reference to intentional or fraudulent conduct in terms of the traditional norms of the common law have no application to the present case, arising as it does under the Federal Securities Laws. Section 1401 of the New York Civil Practice Law and Rules (see Pet. Appx. "A" p. 15) which expressly permits contribution to be sought from joint tort-feasors by motion in an "action . . . for property damage", supports, and surely cannot be claimed to bar, the recovery of contribution in the instant case.

II.

The Courts have permitted a right of contribution, even without statutory authority.

The petition argues that the right to contribution should not exist in the absence of specific legislation. Even if there were no legislative support for the granting of contribution herein (but see Point III, *infra*), such an assertion is at odds with the general trend of the law today.

Blair is entitled to contribution from Hoppenfeld and Law Research, fundamentally, because this is equitable and fair. The recognition of the essential fairness of upholding a right of contribution among joint tort-feasors has led both federal and state courts to change the ancient common law bias against such a right, even without legislative alteration. As the Court of Appeals for the Third Circuit stated in *Gomes* v. *Brodhurst,* 394 F.2d 465, 467-468 (3rd Cir. 1968):

> "The . . . question is whether a right of contribution generally exists among joint tort-feasors. That no such right is recognized at common law has long been clear

> . . . . After extended consideration, however, we have decided that there is no compelling reason to defer or deny applying what we deem a rule of reasoned fairness. There is no longer a legitimate place in our system, if, indeed, there ever was, for a rule of law which places the full burden of restitution upon one who is only in part responsible for a plaintiff's loss. Such a philosophy stems from a more ancient day which more easily intermingled penal and compensatory considerations. See generally Prosser, Torts §47 (3d ed. 1964)."

Both of the courts below expressly reviewed and relied upon many other recent cases which have recognized the essential fairness of judicially allowing contribution among joint tort-feasors even in the absence of legislation expressly changing the old contrary common law doctrine. (See Pet. Appx. "B" pp. 19-20, citing decisions and other authority.)

III.

The Federal Securities Laws, and the Court decisions thereunder, uniformly support the right to contribution in this case.

Although petitioners also contend that there is no federal legislation permitting contribution in this case, Blair's right to contribution from Hoppenfeld and Law Research is supported by the uniform provisions of, and decisions under, the various Federal Securities Laws. The various sections of the Federal Securities Laws which expressly provide for civil liability, also expressly provide for contribution. See section 11 of the Securities Act of 1933 (15 U.S.C. §77k), sections 9 and 18 of the Securities Exchange Act of 1934 (15 U.S.C. §§78i, 78r).

The joint and several judgment in the present case was based only upon violations of section 17(a) of the 1933 Act and 10(b) of the 1934 Act (15 U.S.C. §§77q(a) and 78j(b)). These sections do not specifically provide for civil liability and accordingly do not specifically provide for contribution.

However, the courts which have implied civil liability for violations of these sections, have also, on the basis of consistency, implied a right to contribution. Thus, in the case of *deHaas* v. *Empire Petroleum Co., supra,* the court on this point said:

> "[T]hose sections of the [securities acts] which expressly provide for civil liability contain express provisions for contribution among intentional wrongdoers. [citing §11 of the 1933 Act, 15 U.S.C. §77k and §§9

and 18 of the 1934 Act, 15 U.S.C. §§78i and 78r.] Since the specific liability provisions of the Act provide for contribution, it appears that contribution should be permitted when liability is implied under Section 10(b). III Loss, Securities Regulation 1739-40, n. 178 (1961)." 286 F. Supp. at 815-16.

Agreeing with *deHaas,* Judge Frankel and the Second Circuit held here, as an additional reason for granting contribution to Blair, that the Securities Laws are to be read together: "This is simply a pertinent application of the general principle that the two statutes are to be administered *in pari materia*" (Pet. Appx. "B", p. 20).

IV.

The decision below gives proper recognition to the need for sound enforcement policies in civil actions under the Federal Securities Laws as against all defendants therein.

In an earlier decision in the present case, *Globus* v. *Law Research Service, Inc.,* 418 F.2d 1276 (2d Cir. 1969), *cert. den.* 397 U.S. 913 (1970) the Second Circuit established the salutary principle that in order to promote compliance with the Federal Securities Laws, enacted to protect the public, all wrongdoers charged with violations thereof must bear their respective share of the statutory liabilities. As the Second Circuit stated:

" . . . [T]he proper purpose of the Act is to encourage diligence, investigation and compliance with the requirements of the statute by exposing issuers and underwriters to the substantial hazard of liability for compensatory damages" (418 F.2d at 1289).

The decisions below recognize that the ruling on contribution, sought to be reviewed on the present appeal, carries out this salutary purpose, and serves the need for promoting compliance on the part of all charged with violation of the public interest provisions of the Federal Securities Laws.

CONCLUSION

The decision of the Second Circuit and of the District Court sought to be reviewed on the petition for certiorari herein, represents such a clear application of established and appropriate legal principles under the Federal Securities Laws that no review thereof by this Court is necessary or appropriate under Rule 19. The petition for certiorari should be denied in all respects.

Respectfully submitted,

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Of Counsel:
THOMAS R. ESPOSITO

Dated: October 13, 1971

Certificate of Service

I, MILTON BLACK, of Mudge Rose Guthrie & Alexander, hereby certify that copies of the foregoing Brief in Opposition to Petition for Certiorari on Behalf of Respondent Blair & Co., Granbery Marache Incorporated, have been served on counsel by mailing copies by United States mail, postage prepaid, to Gabriel I. Levy, Esq., Counsel for Petitioners, 350 Fifth Avenue, New York, New York, 10001, this 13th day of October, 1971.

MILTON BLACK